

**OFFICE OF SPECIAL MASTERS**

**No. 98-911V**

**FILED: March 17, 2003**

**(Reissued for Publication April 22, 2003)<sup>1</sup>**

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BARBARA BEATTY, mother and guardian	*	
of TERESA SERIO, a minor,	*	
	*	
	*	
Petitioner,	*	
	*	TO BE PUBLISHED
v.	*	
	*	
SECRETARY OF HEALTH AND	*	
HUMAN SERVICES,	*	
	*	
Respondent.	*	
	*	

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**DECISION AWARDING ATTORNEYS' FEES AND COSTS**

On January 27, 2003, petitioner filed an application for attorneys' fees and costs. Petitioner requests an award of \$16,287.25 in fees and \$253.29 in costs. On February 13, 2003, respondent filed his opposition. On February 28, 2003, petitioner filed a Statement of Client in compliance with General Order #9. In the statement, petitioner referred to a Table of Expenses. However, the Table of Expenses was not attached. On March 11, 2003, petitioner faxed the missing Table of Expenses. Attached is the Table of Expenses to be filed by my leave. In the Table of Expenses, petitioner states that petitioner had no costs.

**PROCEDURAL HISTORY**

On December 7, 1998, petitioner filed for compensation under the National Childhood Vaccine Injury Act of 1986 (Vaccine Act), as amended, 42 U.S.C. § 300aa-10, et seq. Petitioner alleged her daughter Teresa Serio suffered injuries after receipt of Tetramune, Hepatitis B, and

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<sup>1</sup> This decision was originally issued unpublished on March 17, 2003. On April 18, 2003, respondent moved to have this decision published. Respondent's motion is granted and the decision is reissued as a published decision. *The reissuance of this decision shall not affect the time for filing a motion for review pursuant to Vaccine Rule 23.*

OPV on December 11, 1996. No medical records or affidavits were filed with the petition. On December 8, 1999, petitioner's counsel filed a "Motion to Designate Dunbar v. Secretary, HHS, No. 98-627V as the Master File for All Hepatitis B Claimants Represent by the Undersigned Counsel." Respondent opposed said motion, and on February 14, 2000, petitioner's motion was denied.

On July 31, 2001, petitioner moved for issuance of subpoenas for the purpose of obtaining medical records relevant to her claim. The undersigned granted petitioner's request on August 7, 2001. On August 23, 2001, the undersigned ordered petitioner to file a single medical record by November 30, 2001 because not a single medical record had been filed since the petition had been filed two and three-quarters years earlier.

On November 8, 2001, petitioner filed Exhibits 1 through 10, consisting of 134 pages of medical records. On February 4, 2002, the undersigned issued an Order to Show Cause summarizing the medical records and stating:

The undersigned fails to see how there can be any relationship between Teresa's brief fever and irritability after her vaccination on December 11, 1996, and the onset of her developmental delays in approximately June 1997, an interval of six months. The undersigned does not believe that petitioner will find an expert to support her allegations that Teresa's vaccinations caused her developmental delays and cerebral palsy.

In response to the Order to Show Cause, on March 22, 2002, petitioner's counsel filed a Status Report which indicated that he had difficulty locating petitioner to discuss the order with her, due to incorrect contact information. Upon locating petitioner, petitioner's attorney learned that Teresa Serio had been diagnosed with a condition referred to as "'22Q13 terminal deletion,' which is a missing stem of chromosome."<sup>2</sup> Counsel requested additional time to prepare pleadings dismissing petitioner's case. On May 24, 2002, petitioner filed a Voluntary Dismissal Without Prejudice. On May 31, 2002, the Clerk of the Court of Federal Claims entered judgment, dismissing the petition without prejudice. On July 29, 2002, petitioner filed an Election to File Civil Action.

On January 29, 2003, petitioner filed an Application for Attorneys' Fees and Costs.

## **DISCUSSION**

### **I. Attorneys' Fees**

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<sup>2</sup> Petitioner's attorney has not provided information concerning the date that Teresa Serio was diagnosed with said condition.

In calculating an appropriate attorneys' fee award, the court reviews the hourly rates charged by the attorney(s) as well as the amount of time he or they expended on litigation.

#### A. Hourly Rates

Pursuant to 42 U.S.C. § 300aa-15(e)(1), the special master may award "reasonable" attorney fees as part of compensation. Special masters have employed the lodestar method to determine the reasonable amount of attorneys' fees and costs to be awarded. Rupert v. Secretary, HHS, 52 Fed. Cl. 684 (2002). Under the lodestar method, a rate is normally reasonable when it is in line with the rate "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." Rupert at 687, citing Blum v. Stenson, 465 U.S. 886, 895 (1994).

Petitioner has the burden of proving that a requested hourly rate is reasonable and representative of hourly rates in a particular market. "The burden is on the fee applicant to produce satisfactory evidence - in addition to the attorney's own affidavits - that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, expertise, and reputation." Blum, 465 U.S. at 896, n. 11. Accordingly, in support of a fee petition, petitioner must submit specific, detailed evidence of what the relevant community rate is for similar services by lawyers of reasonably comparable skill, experience, and reputation.

#### Clifford J. Shoemaker

Mr. Shoemaker has requested an hourly rate of \$295.00. The undersigned's most recent award to Mr. Shoemaker for attorney's fees was an hourly rate of \$195.00. Slay v. Secretary of HHS, No. 00-289V, 2001 WL 11168103 (Fed. Cl. Spec. Mstr. Sept. 13, 2001). In the present case, Mr. Shoemaker has not provided any affidavits from disinterested attorneys offering proof that the hourly rate he seeks in this case is the prevailing market rate. Furthermore, petitioner has not provided any evidence substantiating that the requested rate is in line with the prevailing market rate. Therefore, the undersigned compensates Mr. Shoemaker at an hourly rate of \$205.00, recognizing a \$10.00 increase in the hourly rate generally over the past one and one-half years as reasonable.

#### J. Bradley Horn

\_\_\_\_\_ In the present case, Mr. Horn requests an hourly rate of \$275.00. The undersigned compensated Mr. Horn at an hourly rate of \$175.00 in Slay. Petitioner has not provided any evidence substantiating that the requested rate is in line with the prevailing market rate. Therefore, recognizing again a \$10.00 increase in the hourly rate generally over the past one and one-half years as reasonable, the undersigned compensates Mr. Horn at an hourly rate of \$185.00.

#### Renee J. Gentry

In the present case, Ms. Gentry requests an hourly rate of \$200.00. Again, petitioner has failed to establish that the hourly rate requested for Ms. Gentry is in line with the prevailing market rate for someone with her skill, expertise, and reputation. This is the first case before the undersigned where Ms. Gentry's hourly rate is at issue. However, in Slay the undersigned awarded Ms. Ghada Anis, another attorney in Mr. Shoemaker's practice, a rate of \$135.00. Ms. Anis and Ms. Gentry both started at Mr. Shoemaker's firm at the same time and neither had tried vaccine cases before. Therefore, the undersigned awards Ms. Gentry a comparable rate to Ms. Anis. Given nearly one and one-half years has passed since the Slay decision, the undersigned compensates Ms. Gentry at an hourly rate of \$145.00.

#### B. Time Expenditure

In order to determine the number of hours that were reasonably expended, the special master must "exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary." Hensley v. Eckerhart, 461 U.S. 424, 433-44 (1983). "A special master may rely upon her own experience under the Program as well as her experience with counsel in each case to make a determination of a reasonable number of attorney hours expended in a particular matter." Plott v. Secretary of HHS, No. 92-633, 1997 WL 842543, at \*3 (Fed. Cl. Spec. Mstr. April 23, 1997), citing, Wasson v. Secretary of HHS, 24 Cl. Ct. 482, 483 (1991); see also Guy v. Secretary of HHS, 338 Fed. Cl. 403, 406 (Fed. Cl. 1997).

Mr. Shoemaker spent 50.5 hours on this case. The undersigned finds the requested hours to be excessive. Most of this time was spent on "review" of this case. In respondent's response to petitioner's application for attorneys' fees and costs, respondent notes that between March 20, 1998 and August 5, 2002, no less than 35 entries in Mr. Shoemaker's itemization of his hours included "file review" or "records review". It is unclear what Mr. Shoemaker was reviewing given he filed only 134 pages of medical records and not a single medical expert report. From April 14, 1998 to November 6, 2001, he claims he expended a total of 29.38 hours talking with the client to prepare medical records, collecting and reviewing medical records, and preparing an affidavit for petitioner. After purportedly 30 hours of work, he filed only 134 pages of medical records but no affidavit from petitioner.

In addition, Mr. Shoemaker records that he spent 2.43 hours preparing status reports from July 5, 2000 to March 12, 2001. During that time, the record shows that petitioner filed four status reports. The status reports filed during this time each contain either two or three sentences. Spending 2.43 hours to prepare four status reports that contain no more than three sentences each is excessive.

Mr. Shoemaker claims to have spent .80 hour preparing a motion to designate Dunbar as the master file. Review of this motion shows that Mr. Shoemaker, on behalf of petitioners, filed the same motion in 122 cases. The undersigned can only assume that he requested or intends to

request .80 hour in each of the 122 cases. This would amount to a total of 97.6 hours to prepare a motion to designate Dunbar as the master file. Clearly, this is excessive.

Finally, Mr. Shoemaker and Ms. Gentry claim a total of six hours to prepare a 25-page application for attorneys' fees and costs. Of the total 25-page application, 10 pages were print-outs of time expended by each attorney and 14 pages were copies of receipts. They did not provide any legal memorandum to accompany the application, any affidavits from them or any affidavits from disinterested attorneys offering proof that the hourly rate they seek in this case is the prevailing market rate. Two attorneys expending six hours to prepare this application is unreasonable.

Respondent argues that considering how little activity occurred in this case between the date of filing the petition and the date that petitioner voluntarily dismissed, Mr. Shoemaker should be compensated for 50 percent of the time for which he billed. After review of the record, the undersigned agrees with respondent and compensates Mr. Shoemaker for 25 hours, Mr. Horn for 1.90 hours, and Ms. Gentry for one hour. According to the application, Ms. Gentry spent 5 hours on this case and all of that time was spent on preparing the fee petition. Five hours to prepare this application is excessive and it is the experience of the undersigned that the fee application filed in this case should not have taken more than an hour to complete.

### CONCLUSION

The court awards \$5,621.50 for fees and \$253.29 for costs.<sup>3</sup> The clerk shall enter judgment for \$5,874.79 and shall direct that the award be in the form of a check jointly payable to petitioner and Mr. Shoemaker. In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court is directed to enter judgment herewith.<sup>4</sup>

### IT IS SO ORDERED.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Laura D. Millman  
Special Master

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<sup>3</sup> This amount reflects attorneys' fees of \$5,125.00 (25 hours at a rate of \$205) for Mr. Shoemaker, \$351.50 (1.9 hours at a rate of \$185) for Mr. Horn, and \$145.00 (1 hour at a rate of \$145) for Ms. Gentry.

<sup>4</sup> Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by each party's filing a notice renouncing the right to seek review.